No. 78-1387

In the Supreme Court of the United States

OCTOBER TERM, 1978

JUVENTINO SALINAS MUNOZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 3) that the Double Jeopardy Clause bars their trial on a superseding indictment because the trial court dismissed the initial jury before it was sworn.

On September 13, 1977, petitioners, along with 20 other defendants, were charged with violating the federal narcotics laws in a 15-count indictment filed in the United States District Court for the Southern District of Texas. Petitioners' trial was scheduled for February 1978, and on January 6, 1978, the jury was selected but not sworn (Pet. App. A-6).[1] Subsequently,

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[1]Petitioners' co-defendants pleaded guilty pursuant to a plea agreement with the government; however, when the district court rejected the government's sentencing recommendation, the co-defendants were permitted to withdraw their guilty pleas (Pet. App. A-5).

on January 31, 1978, the government charged petitioners in a superseding indictment that reflected the results of an ongoing investigation.[2] The district court granted the government's motion to dismiss the original indictment and thereafter discharged the jury (Pet. App. A-5 to Pet. App. A-6). The district court denied petitioners' subsequent motion to dismiss the superseding indictment on grounds of Double Jeopardy, and the court of appeals affirmed (Pet. App. A-1 to A-8).

Petitioners contend that their motion to dismiss the superseding indictment should have been granted because jeopardy had attached when the jury was selected. However, it is well-established that jeopardy does not attach until the jury has been empaneled and sworn, *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975). Here the jury was never sworn, and there is thus no constitutional bar to petitioners' trial on the superseding indictment. See also *United States* v. *Wedalowski*, 572 F. 2d 69, 74-75 (2d Cir. 1978); *United States* v. *Gates*, 557 F. 2d 1086, 1088-1089 (5th Cir. 1977), cert. denied, 434 U.S. 1017 (1978); *United States* v. *Green*, 556 F. 2d 71 (D.C. Cir. 1977).[3]

[2]The 27-count superseding indictment named five additional defendants and deleted two original defendants. In addition, the importation conspiracy alleged in Count 1 charged 11 new overt acts, beginning some five months earlier than those charged in the first indictment. The superseding indictment charged petitioner Munoz with 14 counts and petitioners Alvarado and Casiano with three counts each, whereas the original indictment had named Munoz in eight counts, Alvarado in two counts, and Casiano in four counts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]Petitioners argue that jeopardy should attach as soon as the jury is selected, rather than when it is sworn, to prevent the government from "discard[ing] a jury if it happens not to like that particular jury" (Pet. 3). Whatever merit this argument might have in other circumstances, nothing in the record suggests that the government's action was improperly motivated in this case. To the contrary, the government's ongoing investigation prompted the superseding indictment.

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